

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
MICHAEL KELLY REVOCABLE TRUST)
)
Licensee of Multipoint Distribution Service)
Stations WHT629 and WLK242, Shannondale,)
West Virginia)
)
Request for Waiver of Section 21.44 of the)
Commission's Rules)
)

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 2004

Released: March 17, 2004

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

1. *Introduction.* On July 21, 2003, the Michael Kelley Revocable Trust, dba Shannondale Wireless (Kelley) filed a request for waiver pursuant to Section 21.44 of the Commission's Rules¹ seeking authorization to remove the facilities without surrendering its licenses for Multipoint Distribution Service (MDS) Stations WHT629 and WLK242, on MDS Channels 1 and 2A,² respectively, in Shannondale, West Virginia.³ For the reasons discussed below, we grant the Waiver Request.

2. *Background.* A license for Station WHT629 was originally issued in 1986.⁴ A license for Station WLK242 was originally issued in 1988.⁵ Both stations broadcast from a tower where Michael Kelley owned a house.⁶ In 1996, Kelley entered into an agreement with CFW Cable, later renamed Ntelos (Ntelos), to lease the transmission capacity of the two stations in a wireless cable system that Ntelos planned to deploy.⁷ Ntelos also leased the transmission capacity of Station WMY489, which was

¹ 47 C.F.R. § 21.44.

² The Commission allotted two 6 MHz channels (2150-2156 and 2156-2162 MHz) to MDS in fifty of the largest metropolitan areas (referred to as MDS Channel Nos. 1 and 2). In the rest of the country, including Shannondale and Martinsburg, only ten megahertz of spectrum is allotted to MDS in this band—namely, Channel No. 1 (2150-2156 MHz) and Channel No. 2A (2156-2160 MHz). See Amendment of Part 21.703(g), and (h) of the Commission's Rules, *Memorandum Opinion and Order*, 47 FCC 2d 957 (1970).

³ Letter from the Michael Kelley Revocable Trust, u/d/t 5-18-94 to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 21, 2003) (Waiver Request).

⁴ File No. BMLMD-875004 (granted Nov. 25, 1986).

⁵ File No. BLMD-8850158 (granted May 4, 1988).

⁶ Waiver Request at 2.

⁷ *Id.* at 1.

also licensed to Kelley.⁸

3. In April 1998, the former Mass Media Bureau granted applications to modify all three stations to relocate the stations across the Shenandoah Valley to the Ntelos wireless cable site near Martinsburg, West Virginia.⁹ Five months later, the Commission adopted rules making it substantially easier for MDS and Instructional Television Fixed Service (ITFS) operators to provide high-speed two-way digital services to fixed locations.¹⁰ The *Two-Way Order* allowed MDS and ITFS licensees to use all or part of each 6 MHz channel for return path transmissions from subscriber premises, to cellularize their transmission systems, and to employ modulation schemes consistent with bandwidths either larger or smaller than 6 MHz.¹¹ Kelley requested and obtained extensions of time to construct until March 20, 2003, to provide Ntelos with adequate time to review its system architecture with an eye towards using Kelley's stations in a two-way configuration.¹²

4. Relying upon Ntelos' contractual commitment to relocate and rebuild all three of Kelley's MDS stations before March 20, 2003, Michael Kelley sold his home and the small tower used by the stations on October 1, 2001, subject to a short-term agreement to lease back the tower and space for the transmitters.¹³ Ntelos relocated Station WMY489, and Kelley certified construction of the modified station on February 27, 2003.¹⁴ Kelley and Ntelos jointly concluded that it would be unreasonable to build new facilities for Stations WHT629 and WLK242 using outdated one-way technology because the Commission was contemplating relocating licensees on MDS Channels 1 and 2 to other bands.¹⁵ Specifically, in November 2002, the Commission decided to reallocate five megahertz of spectrum in the 2150-2155 MHz band to Advanced Wireless Services (AWS)¹⁶ and announced its intention to conduct further analyses of relocation options for MDS incumbents in the 2150-2160 MHz band, *i.e.*, MDS

⁸ *Id.*

⁹ *Id.* See File Nos. BLMFMD-9750405, BLMFMD-9750407, BLMFMD-9750408 (granted Apr. 29, 1998).

¹⁰ See Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order*, 13 FCC Rcd 19112 (1998) (*Two-Way Order*), *recon.*, 14 FCC Rcd 12764 (1999), *further recon.*, 15 FCC Rcd 14566 (2000).

¹¹ *Id.* at 19118 ¶ 12.

¹² Petition at 2.

¹³ *Id.*

¹⁴ File No. MD-20030227AAG.

¹⁵ Petition at 2.

¹⁶ Advanced Wireless Services is the collective term that the Commission uses for new and innovative fixed and mobile terrestrial wireless applications using bandwidth that is sufficient for the provision of a variety of applications, including those using voice and data (such as Internet browsing, message services, and full-motion video) content. In an ongoing service rules proceeding for 90 megahertz of spectrum for AWS, the Commission proposed to adopt rules to provide innovative and agile licensees with the flexibility to adapt quickly to changes in technological capabilities and marketplace conditions into the future, and stated that its goal for the AWS-designated spectrum was "to put this spectrum to its highest value use with minimal transaction cost." Service Rules for Advanced Wireless Services, WT Docket No. 02-353, *Notice of Proposed Rulemaking*, 17 FCC Rcd 24135 (2002). Although AWS is commonly associated with so-called third generation (3G) applications and has been predicted to build on the success of such current-generation commercial wireless services as cellular and Broadband PCS, the services ultimately provided by AWS licensees are only limited by the fixed and mobile designation of the spectrum that the Commission allocates for AWS and the service rules that it ultimately adopts for the bands. Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, ET Docket No. 00-258, *Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order*, 18 FCC Rcd 2223 (2003) (*Third Report and Order*) at 2224 n. 1.

licensees on Channels 1 and 2A.¹⁷ In January 2003, the Commission tentatively concluded that the MDS spectrum at 2155-2160/62 MHz should be made available for new fixed and mobile services, including AWS, and invited comment on a wide range of alternative configurations for the 2150-2160 MHz band, expressing its belief that a complete record required that “all spectrum options should be explored.”¹⁸

5. On March 4, 2003, Ntelos filed for bankruptcy protection, requesting, *inter alia*, permission to reject the leases for Stations WHT629 and WLK242.¹⁹ In addition, the lease agreement with the purchasers of Kelley’s former home has expired, and the new owners have declined to renew it.²⁰ Kelley states that he has located a suitable transmitter site where Stations WHT629 and WLK242 can be relocated.²¹ He states that he cannot file an application to modify those stations because the Commission has imposed a freeze on the filing of MDS modification applications.²²

6. *Discussion.* Under Section 21.44(a)(3) of the Commission’s Rules, a license shall be automatically cancelled upon the voluntary removal or alteration of the facilities for more than 30 days.²³ Kelley seeks a waiver to allow the voluntary removal of the facilities without triggering automatic cancellation of the licenses. Pursuant to Section 21.19 of the Commission’s Rules,²⁴ an applicant seeking a waiver must make an affirmative showing that: (a) The underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest; or (b) The unique facts and circumstances of a particular case render

¹⁷ Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, ET Docket No. 00-258, *Second Report and Order*, 17 FCC Rcd 23193 (2002) (*Second R&O*) at 21196 ¶ 6.

¹⁸ *Third Report and Order* at 2255 ¶ 68. The Commission stated that the spectrum could be offered in equally sized paired blocks to support frequency division duplex, time division duplex, or a combination of those applications; combining the band in the alternative with various other bands; and symmetric or asymmetric pairing of channels. *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Waiver Request at 3.

²² *Id.* On April 2, 2003, as part of a comprehensive review of the rules relating to MDS and the Instructional Television Fixed Service (ITFS), the Commission determined that applications for new MDS or ITFS licenses, major modifications of MDS stations, or major changes to ITFS stations other than applications for license assignments or transfers of control would not be accepted until further notice. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission’s Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission’s Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; WT Docket Nos. 03-66, 03-67, 02-68, MM Docket No. 97-217, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722, 6825 ¶ 259 (2003). We took that action to permit the orderly and effective resolution of issues in this proceeding and explained that, absent such action, applications for new licenses, amendments, and modifications might limit the effectiveness of the decisions ultimately made in the context of this proceeding. *Id.* at 6813 ¶ 226. Subsequent to the filing of the Waiver Request, the Commission lifted the freeze on the filing of MDS modification applications. In the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66, *Second Memorandum Opinion and Order*, 18 FCC Rcd 16848 (2003). In granting the Waiver Request, we do not rely upon Kelley’s arguments regarding the application freeze.

²³ 47 C.F.R. § 21.44(a)(3).

²⁴ 47 C.F.R. § 21.19.

application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.²⁵

7. We believe that Kelley has justified a waiver under the second prong of the waiver standard. In particular, we believe that, as a licensee on MDS Channels 1 and 2A, Kelley faces unique circumstances that would make a strict application of Section 21.44(c) inequitable. Since January 2001, the Commission has been examining whether the 2150-2162 MHz band would be appropriate for AWS. As noted above, the Commission reallocated the 2150-2155 MHz segment of this band in 2002 to support new advanced wireless services.²⁶ The Commission stated that it would identify relocation spectrum for MDS licensees in a later, separate proceeding,²⁷ and has asked commenters to address the impact of reallocating this spectrum, to identify other frequency bands that could accommodate MDS services, and to comment on how its Emerging Technologies relocation procedures would apply.²⁸ Subsequently, on January 29, 2003, the Commission tentatively concluded that it should reallocate MDS spectrum at 2155-2162 MHz for new fixed and mobile services, including AWS.²⁹ Under those circumstances, and particularly given the fact that we have not yet identified replacement spectrum, we do not believe that it would be reasonable to require Kelley to reconstruct the facilities on MDS channels 1 and 2A at this time.

8. For the reasons stated above, we conclude that Kelley has presented sufficient justification for a waiver of Section 21.4(c) of the Commission's Rules. We shall grant a waiver for one year from the release date of this *Memorandum Opinion and Order*.

9. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 21.19 21.44 of the Commission's Rules, 47 C.F.R. §§ 21.19, 21.44, the waiver request filed by The Michael Kelley Revocable Trust on July 21, 2003 IS GRANTED, and MDS Stations WHT629 and WLK242, Shannondale, West Virginia, MAY REMAIN SILENT until March 17, 2005.

10. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau

²⁵ *Id.*

²⁶ See *Second R&O*, 17 FCC Rcd at 23212 ¶ 40.

²⁷ *Id.* at 23212-23213 ¶ 41.

²⁸ See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, ET Docket No. 00-258, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 16043 ¶¶ 40-41 (2001).

²⁹ See *Third Report and Order*, 18 FCC Rcd at 2255 ¶ 68.